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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 507

AMERICAN TRANSIT LINES, *Petitioner*

v.

RALPH R. SMITH, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
Reasons for Granting the Writ	6
Conclusion	10
Appendix A	11

TABLE OF AUTHORITIES

Cases

American Trucking Assns. v. *United States,* 344 U.S. 298, (1953)	8
Costello v. *Smith,* 179 F. 2d 715 (C.A. 2, 1950)	6
Eckard v. *Johnson,* 235 N.C. 538, 70 S.E. 2d 488 (1952)	7
Gallagher's Estate v. *Battle,* 209 Md 592, 122 A. 2d 93 (1956)	7
Hall v. *Gallagher,* —— Del. ——, 125 A. 2d 507 (1956)	7
Harrison v. *Greyvan Lines,* 331 U.S. 704 (1947)	8
Simon v. *McCullough Transfer Co.,* 155 O.S. 104, 98 N.E. 2d 19 (1951)	7

Miscellaneous Authorities

Act of August 3, 1946 (49 U.S.C. sec. 304 (e) and (f))	8, 9
S. Rept. 1271, 84th Cong., 1st Sess.)	9
Lease and Interchange of Vehicles, 52 M.C.C. 675 (1951)	8

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RALPH R. SMITH, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

American Transit Lines respectfully prays that a writ of certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Sixth Circuit, affirming a judgment of the United States District Court for the Northern District of Ohio, Eastern Division, awarding damages to Respondent in a personal injury case.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A hereof) is reported at —— F. 2d ——. There was no written opinion by the District Court; its findings of facts and conclusions of law are at AR. 24a.*

* AR references refer to the record appendices to the parties' briefs in the Court of Appeals. Page numbers followed by "a" refer to Petitioner's (Appellant's) appendix below; page numbers followed by "b" refer to Respondent's (Appellee's) appendix below.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1957. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly imposed liability on a motor common carrier for the negligence of an owner-driver whom it had leased for a one-way trip, where the negligence occurred after the trip-lease had ended by its terms, after the trip-lessor had fulfilled his obligation to deliver goods, and while the trip-lessor was proceeding on independent business of his own to the terminal of another carrier.

STATUTE INVOLVED

Pertinent to the issues of this case is the Act of August 3, 1956, 70 Stat. 983, 49 U.S.C. sec. 304(e) which provides in part:

> "Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—
>
> (1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and
>
> (2) such other regulations as may be reasonably necessary in order to assure that while

motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment."

Also pertinent to the issues are the regulations of the Interstate Commerce Commission governing the lease and interchange of vehicles which provide in part (49 C.F.R. sec. 207.4):

"* * * authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) The contract, lease, or other arrangement for the use of such equipment: * * *

(4) Shall provide * * * for the complete assumption of responsibility in respect thereto, by the authorized carrier * * *

(i) For the duration of said contract, lease, or other arrangement * * *"

STATEMENT

Respondent brought suit against Petitioner for personal injuries suffered when the automobile he was driving was struck by a tractor-trailer driven by one Medovic.* On trial without a jury, judgment for $12,500 was entered for Respondent on the basis of the court's conclusion of law that "the tractor-trailer outfit involved in the collision was being operated for American Transit Lines at the time of the collision" (AR. 25a).

* Suit, commenced in state court, was removed to the federal court on grounds of diversity of citizenship (AR. 6a).

The circumstances of Medovic's relationship to Petitioner immediately prior to the accident were these: Medovic was an owner-driver who leased his vehicle for one-way trips to various motor carriers, including Petitioner (AR. 12a-13a). A few days before the date of the accident in question, Medovic trip-leased his tractor-trailer to the Cushman Motor Delivery Company and was given a load by that carrier to transport from Cleveland to Racine, Wisconsin. After hauling this load to Racine, Medovic proceeded empty to Hammond, Indiana, retaining in his possession delivery receipts which he intended to return to the Cushman office in Cleveland (AR. 13a). In Hammond, Medovic trip-leased his equipment to Petitioner under the terms of a lease which obligated him to deliver a consignment to the Electro Motive Division of General Motors Corporation in Cleveland (AR. 14a). The lease further included provisions as follows (AR. 22a-23a):*

> "It is hereby agreed that the lessor shall furnish the use of the above-described vehicle or vehicles in transporting such property as lessee may designate for a trip from the point of origin [i.e., Hammond, Indiana] to the destination indicated above [i.e., Electro Motive Division, 8500 Clinton Road, Cleveland, Ohio] • • •.
>
> "Lessor • • • agrees to drive or operate the vehicle or vehicles described above *for a single trip from the point of origin to the destination indicated above,* under load with the material specified above, which material lessor further agrees to deliver to the above-named consignee in good condition and to obtain a receipt therefor and promptly to transmit said receipt to carrier."

---

* In the courts below, Respondent urged that this trip-lease was not in effect, having been signed, not by Medovic, but by one of Petitioner's employees on Medovic's behalf. However, this trip-lease, Exhibit C (AR. 22a-23a) constituted the only arrangement between Medovic and Petitioner. Medovic testified that the only lease under which he operated was Exhibit C and he operated under the same type of trip-lease on all prior trips (AR. 19a-20a).

Medovic left Hammond pursuant to the terms of this lease and arrived at the Electro Motive plant in Cleveland in the early morning hours of June 22, 1951. He slept in his truck for a few hours, and then had it unloaded by the consignee when the business day began at 8:00 A.M. When the unloading was finished, Medovic left the Electro Motive plant and was proceeding to the Cushman terminal to deliver the papers he still retained in connection with his trip to Racine (AR. 14a-15a). While on this mission, and at a time when Medovic testified he "had nothing further to do with American Transit" (AR. 16a), the accident in question occurred.**

In charging Petitioner with Medovic's negligence on this state of the record, both courts below took the position that Medovic's relationship with Petitioner was closer than that with any other common carrier because of the following facts. Medovic regarded himself as a "regular man" for Petitioner (AR. 18a), and testified that he usually, but not always, checked with Petitioner to see if it wanted his services before he trip-leased to other carriers (AR. 18a-19a). His tractor-trailer had decals bearing Petitioner's name, but these had been on the tractor-trailer when Medovic acquired the equipment from its prior owner (AR. 10b), and when Medovic hauled loads for others, the painted decals were covered with removable cardboard decals bearing the name of the carrier to whom he had leased (AR. 19a).

The Court of Appeals was unwilling to rest its decision on the ground that Medovic's relationship with Petitioner

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** The Court of Appeals states that Medovic's "tractor-trailer was being operated in the general direction of defendant's [Petitioner's] yard." There is not a jot of evidence in the record in support of this assertion. The record is crystal clear that at the time of the accident Medovic had completed his trip for Petitioner, and was driving empty to the Cushman office to settle his personal business with Cushman in connection with his earlier trip to Racine (AR. 15a). In fact, after the accident Medovic went on to Cushman's (*Ibid.*).

was such that he was constantly under the direction and control of Petitioner. It took judicial notice of the increasing number of vehicles and accidents (App. p. 18) and quoted with approval statements whose purport was that the general public required increased protection from increased hazards and that the law "should expand to cover newly created and changing conditions and necessities" (App. p. 17). In the view that Petitioner had "put the entire trip in motion" (App. p. 18), and that even a movement by Medovic to his base of operation was "part of the movement of defendant's [Petitioner's] authorized transportation" (App. p. 20), it imposed liability on Petitioner.*

REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with decisions of the Court of Appeals for the Second Circuit and of the highest courts of several states. In *Costello* v. *Smith*, 179 F. 2d 715 (C.A. 2, 1950), a trip-lessor was involved in an accident after completing his one-way trip and while returning empty to the city which was both the trip-lessor's and the carrier's base. The Court of Appeals refused to saddle the carrier with liability, and specifically rejected arguments of the type adopted by the Court of Appeals below.

In the *Costello* case, the court said that the return journey represented the trip-lessor's, not the carrier's,

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* In the course of trial, the District Court had said (AR. 21a):

"All these nice distinctions in law, and the requirements of establishing agency, and not being able to prove agency by the agent himself, are fine theoretical principles of law. Of course, they have been in the past sustained as valid.

"But, nevertheless, in the day and age in which we live, with these trucks occupying the highways, it seems to me it's time to review these precise and nice questions of law and determine what is adequate law to protect the public against accidents on the highway * * *."

business, and that in "the absence of statutory command or of regulatory action by the Commission, we cannot say that a one-way lease is so far contrary to the policy of the Act that a court should impose liability on the lessee after the lease has ended" (179 F. 2d at 718). Here, in sharp contrast, the court said (App. p. 18): "If the employer cannot delegate his responsibility to an independent contractor for the period of delivering the load, neither can he delegate his responsibility for that part of the trip which necessarily must be made after the load is delivered. It is the employer who has put the entire trip in motion."

The highest courts of at least Delaware, Maryland, North Carolina and Ohio have similarly refused to extend the liability of common carriers for the negligence of the one-way trip lessor beyond the time when the load is delivered. *Hall* v. *Gallagher,* — Del. —, 125 A. 2d 507 (1956); *Gallagher's Estate* v. *Battle,* 209 Md. 592, 122 A. 2d 93 (1956); *Eckard* v. *Johnson,* 235 N. C. 538, 70 S.E. 2d 488 (1952); *Simon* v. *McCullough Transfer Company,* 155 O.S. 104, 98 N.E. 2d 19 (1951).

2. The question is of nation-wide application, and its resolution is vitally important to the motor carrier and insurance industries. *Prior to the decision below, we know of no case which extended the carrier-lessee's responsibility beyond the duration of the lease or which imposed liability on the carrier-lessee after the undertaking called for by the lease had been completed.* The instant decision not only expands the scope of carrier responsibility, but creates serious uncertainty as to where such responsibility may end. Present methods of conducting trucking operations, sancitioned by long usage and the Interstate Commerce Commission, may be jeopardized.

The determination of the court below to expand previously recognized limits of liability, widely but inde-

finitely, and based only on vaguely articulated grounds of public policy, merits review by this Court. This Court previously saw fit to review a far less significant aspect of the relationship between motor carriers and their driver-lessors. See *Harrison* v. *Greyvan Lines*, 331 U.S. 704 (1947).

3. The court below recognized that it was expanding the area of liability of authorized motor carriers and justified such an expansion solely on nebulous grounds of public policy. It did so without recognizing that both Congress and the Interstate Commerce Commission have taken action in recent years on the general problems arising from the widespread practice of authorized carriers of supplementing their fleets by leasing the vehicles of owner-drivers.

The Commission, in *Lease and Interchange of Vehicles*, 52 M.C.C. 675 (1951), fashioned rules (before this Court in an early version in *American Trucking Ass'ns.* v. *United States*, 344 U.S. 298 (1953)) which were designed both to permit the adequate regulation of all leasing practices and to assure that the carrier had effective control of, and was responsible for, leased vehicles during the period of the lease. In passing the Act of August 3, 1946 (49 U.S.C. 304(e)(f)), Congress both validated the Commission's power to regulate leasing practices and imposed limits on the Commission's power to prohibit trip-leasing.

Neither Congress nor the Commission suggested any need for expanding previously well-recognized limits of carrier liability. Thus, by the Act of August 3, 1946, Congress empowered the Commission to prescribe such regulations as may be necessary to assure that motor carriers are fully responsible for the operation of motor vehicles leased by them, *while such leased vehicles are being used "in the furnishing of transportation of property* . . ." There is no suggestion here that the Commission could or should make carriers responsible for the

operation of leased vehicles *after* they have completed the "furnishing of transportation." On the contrary, Congress limited the Commission's power to impose liability on carriers, for the operation of leased vehicles, to the period while such vehicles were used "in the furnishing of transportation." Clearly, there can be no public policy considerations enabling courts to extend liability far beyond that which Congress authorized the Commission to impose by regulation.

The court's decision is not only inconsistent with but is also in partial frustration of the Congressional purpose underlying the Act of August 3, 1946. The Senate Committee on Interstate and Foreign Commerce, in recommending passage of the bill which, with amendments, became the Act of August 3, 1946, noted that "the practice of leasing is neither unlawful nor bad of itself" (S. Rept. 1271, 84th Cong., 1st sess., p. 2). It explained that a primary purpose of the bill was to permit considerable latitude in the trip-leasing by authorized carriers of motor vehicles used to carry exempt products under Section 203(b)(6) of the Interstate Commerce Act. The court's action, in imposing liability on authorized carriers for the negligence of trip-lessors who have completed their trip, would conflict with the Congressional purpose to sanction trip-leasing of vehicles which have handled exempt commodities in order "to provide a highly flexible motor-transportation service for the rapid and efficient distribution of exempt products to the markets of the Nation" (*Idem.* p. 3). Authorized carriers will hesitate to trip-lease vehicles generally engaged in hauling exempt commodities if the authorized carriers are responsible for the operation of such leased vehicles, not only while they are used in furnishing transportation for the carrier, but also for some indefinite additional period.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1957

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APPENDIX A

No. 13026

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

AMERICAN TRANSIT LINES, *Appellant*, v. RALPH R. SMITH, *Appellee*.	APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided July 2, 1957.

Before [illegible]ONS, Chief Judge, ALLEN and MILLER, Circuit Judge.

ALLEN, Circuit Judge. This is an appeal from a judgment of the District Court in favor of appellee, plaintiff in a personal injury case which was heard by the court without a jury.[1] Plaintiff was injured on June 22, 1951, while operating his automobile north on West 117th Street in Cleveland, Ohio. He had stopped for a red light at the intersection of West 117th Street with Cooley Avenue. At that intersection one Nick Medovic was operating a tractor trailer also in a northerly direction and he struck plaintiff's automobile from the rear, inflicting serious personal injury. The negligence of Medovic was conceded by defendant in the trial. The District Court entered judgment in favor of plaintiff.

[1] The parties will be denominated as in the court below.

The sole question is whether the trial court erred in ruling that Medovic was operating the tractor trailer under defendant's control and direction and that the outfit involved in the collision was being operated for American Transit Lines at the time the accident occurred.

The tractor trailer, which was owned by Medovic, had on each door decals, which were doubly impervious due to the fact that they were varnished. The decals carried the name American Transit Lines and the ICC and PUCO permit numbers issued defendant for interstate operation and for operation in Ohio, Indiana, Michigan and other states. Medovic frequently hauled for defendant, including some three trips a month between Hammond, Indiana, and Clevland, Ohio, where defendant is located. He also, with defendant's permission, hauled for others. On the day of the accident he had just returned from Hammond, Indiana, to Cleveland Ohio, having hauled a load for defendant. His truck was empty. At the time of the collision the tractor trailer was being operated in the general direction of defendant's yard and Medovic had in his possession a delivery receipt and manifest to be delivered to defendant. He also had a receipt to be delivered to Cushman's, another concern for which he had previously hauled a load from Cleveland to Racine, Wisconsin. Medovic said that he did not have any other load for defendant, explaining "No, I hadn't contacted American Transit that early in the morning yet."

The base of operations to which Medovic customarily returned the tractor trailer was defendant's yard or a lot near his home.

Medovic testified that he was operating under a "trip lease" between himself and defendant covering only the one-way trip from Hammond, Indiana, to the Electro Motive Division of General Motors Corporation, hereinafter called Electro Motive, Cleveland, Ohio. Exhibit C, introduced in evidence, was not the trip lease, if any;

actually employed covering this trip. Appellant's counsel said that Exhibit C "represented" the trip lease. As to defendant it was executed "American Transit Lines by E. Sylvester." It was not signed by Medovic, but was signed "N. Medovic by E. S." Defendant admits that "E. S." stands for E. Sylvester, who signed for defendant. The trip lease is claimed to limit defendant's liability to the time actually involved in a single trip contracted for between defendant and Medovic "from the point of origin to the destination indicated," that is, from Hammond, Indiana, to Electro Motive, Cleveland, Ohio. Early on the day of the accident Medovic had delivered defendant's load to Electro Motive and had been given the delivery receipt, which he was required to turn in to defendant. Defendant claimed that it was not liable for the accident upon the ground that its obligation terminated with the delivery of the load to Electro Motive, which delivery was shortly prior to the collision.

At the time of the accident plaintiff was told by Medovic to get in touch with defendant and that defendant would contact him. A Mr. Tracy, a representative of defendant, did in fact contact plaintiff and called upon him some six times. Tracy advised plaintiff not to sue American Transit Lines because it would be a waste of money.

The trial court found as a fact that by the agreement between defendant and Medovic the tractor trailer was under the direction and control of defendant at all times and that the driver was not permitted to operate the tractor trailer outfit for any other person, firm, or corporation without the express authorization of defendant. The court's conclusion of law was that the tractor trailor outfit involved in the collision was being operated for American Transit Lines at the time of the collision.

The findings of fact of the District Court are not to be set aside unless clearly erroneous; Federal Rules of

Civil Procedure rule 52, 28 U. S. C., and we must give due regard to the opportunity of the trial court to judge of the credibility of the witnesses. If supported by the record the findings are binding on appeal. *Reynolds Metals Co.* v. *Skinner*, 166 Fed. (2d) 66 (C. A. 6), certiorari denied 334 U. S. 858.

These findings are supported by the record. Medovic was an evasive witness, as indicated by the District Court. However, he testified in the affirmative in answer to a question whether in his deposition he had not stated that if he hauled for some other company than defendant he always first got defendant's approval for such haul. He stated in effect at the trial that if defendant did not have a load for Medovic and Medovic had secured a load from someone else defendant would authorize him to "go ahead." At the trial Medovic qualified his testimony by stating that a lot of times he "didn't even check with them." The District Court evidently appraised the credibility of this testimony in light of Medovic's manifest interest and concluded that the driver's original story was true. The fact that defendant had exclusive control of Medovic's vehicle and services when and if his services were needed, was evidence of continual control and supports the finding of the District Court. Under the well-established rule the existence of control is proved, not only by its exercise, but also by the right of exercise.

Defendant put on no other witnesses except Medovic and his testimony was not denied. His original view of his relationship to defendant was that he was American's "regular man." This view was recognized by defendant's negotiations after the accident. Medovic told plaintiff to contact American or Markel, to get in touch with "our insurance company." This was followed by repeated negotiations between Markel and plaintiff. These facts also, unexplained and undisputed, are evidence of a continuing relationship between Medovic and

defendant covering the time of the accident, rather than the ephemeral relationship created by a trip lease.

Defendant's contentions are based mainly upon the assumed existence of a one-way trip lease between Medovic and defendant. The cases on which defendant relies most strongly are one-way trip lease cases: *Costello* v. *Smith*, 179 Fed. (2d) 715 (C. A. 2); *Eckard* v. *Johnson*, 235 N. C. 538; *Gallagher's Estate* v. *Battle*, 209 Md. 952; *Hall* v. *Gallagher*, 125 Atl. (2d) 507.

In *Costello* v. *Smith*, *supra*, and *Eckard* v. *Johnson*, *supra*, the trip lease involved contained specific provisions to the effect that liability should terminate upon completion of delivery. The alleged trip lease presented in evidence here contains no such provision.

But no valid trip lease was shown to cover the trip from Hammond to Cleveland. The purported trip lease introduced as being the same type of trip lease as that under which Medovic operated was signed by the same party for both parties. E. Sylvester did not testify, nor did Medovic testify that "E. S." was his agent. The lease was a lease made by defendant's agent with defendant's agent. There being no covering trip lease the District Court correctly relied upon the arrangement and understanding between the parties which evidenced a continued control and direction of Medovic's operations by defendant. The cited one-way trip lease cases do not apply.

Whether or not there was a written lease we think the judgment of the District Court was correct. Under its PUC permit to operate in Ohio defendant carried liability insurance required by the Ohio Code, which compels a private motor carrier to deposit with the PUCO a liability insurance certificate, policy, or bond "to protect the public." Revised Code 4923.08. This liability insurance policy must "be liberally construed so as to attain the legislative intent to protect the general public from loss by injury or death caused by the

negligence of the insured, his agent, his servant or his independent contractor." *Wood* v. *Vona*, 147 O. S. 91. As defendant was holder of a public franchise, under Restatement of the Law of Torts (Vol. II, Negligence), Section 428, it cannot relieve itself of liability even through the employment of an independent contractor. Defendant concedes that this section is applicable here.

It has long been the law of Ohio that the holder of a public franchise cannot, by employing an independent contractor, delegate his duties under the franchise so as to absolve himself from liability. Cf. *Richman Bros. Co.* v. *Miller*, 131 O. S. 424; *Stickel* v. *Erie Motor Freight, Inc.*, 54 O. App. 74; *The Liberty Highway Company* v. *Callahan*, 24 O. App. 374, syllabi 1, 2. The *Liberty Highway* and *Stickel* cases specifically hold that the obligation of a motor transportation company is nondelegable, even though the motor transportation company carries on its business through an independent contractor.

Section 428, Negligence, Restatement of the Law of Torts, reads as follows:

> CONTRACTOR'S NEGLIGENCE IN DOING WORK WHICH CANNOT BE LAWFULLY DONE EXCEPT UNDER A FRANCHISE GRANTED TO HIS EMPLOYER.
>
> An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.

The section is declared in Comment a to be applicable to public service corporations which as such, are of franchise, permitted by their franchise to use instrumentalities which are peculiarly dangerous unless carefully operated. The courts, in response to the growing need for public protection on the highways, have held that the tremendous increase in automobile traffic and the use of

private motor trucks by certified private carriers to increase their facilities of motor transportation involve an unreasonable risk of harm to others within Section 428. The Supreme Court of Appeals of Virginia recently pointed out that freight trucks monopolize the highways and make them dangerous and declared "it is in the light of their potential destructiveness that a high degree of care is but ordinary care." *Boggs* v. *Plybon*, 157 Va. 30. Freight cars which operate along the public highway, intended for the common use of all the people, are dangerous instruments. *Aronovitch* v. *Ayres*, 169 Va. 308, 318. In *Hodges* v. *Johnson*, 52 Fed. Supp. 488, the court declared it is a matter of common knowledge that the transportation of freight upon the highways is fraught with great danger to the traveling public. Cf. *War Emergency Co-op. Assn.* v. *Widenhouse, et al*, 169 Fed. (2d) 403, 407, 408 (C. A. 4).

It is also the law of Ohio that the operation of a motor truck under the circumstances of this record is peculiarly dangerous within the meaning of Section 428. In discussing this particular point the court in *Stickel* v. *Erie Motor Transport, Inc., supra*, 79, declares:

> "The duties, purposes and obligations of motor freight companies, such as the appellee, are quasi-public in nature and the operation of trucks and trailers on the public highways greatly increases the hazards of driving thereon by the many others entitled to use them."

The court then commented that the law "should expand to cover newly created and changing conditions and necessities. It would seem that public policy requires it and that the general public affected by the increased hazards has a right to expect it, and, as we read it, this need and propriety of application are recognized in Section 428, Restatement of the Law of Torts of the American Law Institute."

In *Hodges* v. *Johnson, supra*, the injury for which the action was brought was caused by the negligence of an

independent contractor. The court held that the employer of the independent contractor was liable, together with the contractor, under Restatement of the Law of Torts, Section 428. The driver of the truck, employee of the independent contractor, had completed his mission and was returning with an empty truck. The court held that, since under its franchise the franchise holder is responsible for the operation of the truck on this mission, it is absurd to say that the responsibility should attach "while the truck is proceeding on its journey loaded, and should not attach on the return journey while empty." Both the journey and the return journey, the court held, are necessary parts of the same trip and the whole trip was undertaken and was being made under the authority of the franchise. To the same effect see *Venuto* v. *Robinson*, 118 Fed. (2d) 679 (C. A. 3), in which the injury was inflicted by an independent contractor, but the court held the employer liable for his negligence under Section 428. Cf. *The Liberty Highway Company* v. *Callahan, supra*, syllabi 1, 2; *Marriott* v. *National Mutual Casualty Company*, 195 Fed. (2d) 462 (C. A. 10).

This court takes judicial notice of the fact that in the last 20 years the number of automobiles on the roads has doubled; that the figures of The American Automobile Association for 1955 show that there are 62,053,697 automobiles, including buses and trucks, in the United States. These facts require the inclusion within the rule of Section 428 of cars operated under franchises issued to other concerns for the performance of work which can be done only under a franchise. If the employer cannot delegate his responsibility to an independent contractor for the period of delivering the load, neither can he delegate his responsibility for that part of the trip which necessarily must be made after the load is delivered. It is the employer who has put the entire trip in motion.

In the case here Medovic was compelled to report for assignment before being released for work for others.

Therefore *Sobolovitz* v. *The Lubric Oil Company*, 107 O. S. 204, and *Simon* v. *McCullough Transfer Company, Inc.*, 155 O. S. 104, do not apply. Neither case rules on a question as to the application of Section 428 of the Restatement of the Law of Torts. The *Sobolovitz* case declared that an inference cannot be erected on an inference. In the *McCullough* case, while the *Costello* case, *supra*, was cited and quoted, the facts are totally different from those presented herein. An independent contractor, who had delivered his last load of coal before a weekend recess, had thereafter visited a beer garden, and some two hours later was involved in an accident. Here Medovic could not, under his arrangements with defendant, contract for loads from other concerns until defendant released him. At the time of the accident he was moving in the general direction of defendant's yard, compelled as a part of the pattern of his work to return to base and to report to defendant.

A situation similar to the instant case in many aspects was presented in *Mitchell* v. *Great Eastern Stages, Inc.*, 140 O. S. 137. *Great Eastern* had a PUC franchise from the State of Ohio for operating buses over U. S. Route 40. A bus broke down and was being returned to the company repair shop in Cleveland, Ohio, operating on a highway for which the bus company had no franchise, at the time of the accident which was the basis of the action. *Great Eastern* claimed that, as the bus was not being operated for the carriage of passengers and was not on an authorized route, its movement was not part of the authorized transportation and the company was not liable. The Supreme Court of Ohio held that a certified common carrier had not ceased to operate as such in doing things incidental to the repairing, servicing and housing of its buses. It held that in accomplishing these incidental purposes the common carrier is "as much engaged in the business of common carriage as when actually transporting passengers upon specified routes."

Under this decision the movement of the tractor trailer herein to its base of operation from the spot where it unloaded at Electro Motive is incidental to the housing of the vehicle and is part of the movement of defendant's authorized transportation.

The judgment of the District Court is affirmed.

SUPREME COURT, U.S.
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OCTOBER TERM, 1957.

No. 507.

AMERICAN TRANSIT LINES,

Petitioner,

vs.

RALPH R. SMITH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RESTATEMENT OF QUESTION PRESENTED.

Should this Court review the decision of the Court of Appeals and the law of trip leases in view of the fact that the Court of Appeals affirmed the District Court decision based on its finding of fact that no trip lease was involved?

STATEMENT.

The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals, and it does not involve any question of law justifying review by this Court.

The basis of the Petitioner's argument for review is that the collision occurred after a trip under a so-called trip lease had ended. The entire case of the Petitioner is predicated upon the false assumption of the existence of a trip lease; the trial court found as a fact that no trip lease existed, and the Court of Appeals stated in its opinion (Pet. App. p. 15):

"But no valid trip lease was shown to cover the trip from Hammond to Cleveland. * * * There being no covering trip lease, the District Court correctly relied upon the arrangement and understanding between the parties which evidenced a continued control and direction of Medovic's (the driver) operation by defendant. The cited one-way trip lease cases do not apply."

That the decision of the Court of Appeals is based on a determination of fact by the District Court is clearly stated in the Opinion (Pet. App. 13):

"The trial court found as a fact that by the agreement between defendant and Medovic the tractor trailer was under the direction and control of defendant. * * * The court's conclusion of law was that the tractor trailer outfit involved in the collision was being operated for American Transit Lines at the time of the collision.

"The findings of fact of the District Court * * * are supported by the record."

The instant case is based on a fact question. It is not a decision that this Court should review.

CONCLUSION.

We respectfully submit that the Petitioner's request for certiorari should be denied.

Respectfully submitted,

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